

6 Official Opinions of the Compliance Board 1 (2008)

**OPEN SESSION REQUIREMENT – CLOSED SESSION ON TOPIC BEYOND SCOPE OF
CITED EXCEPTIONS, HELD TO BE A VIOLATION – VIOLATION NOT CURED BY
SUBSEQUENT DISCLOSURE – MINUTES – CLOSED SESSION STATEMENT –
INADEQUATE DESCRIPTION, HELD TO BE A VIOLATION – NOTICE
REQUIREMENTS – TIMING – POSTING OF NOTICE SHORTLY BEFORE
UNANTICIPATED MEETING, HELD NOT TO BE A VIOLATION**

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*Angela Price, Editor
The Kent Island Bay Times*

The Open Meetings Compliance Board has considered your complaint alleging that the Board of County Commissioners of Queen Anne's County violated the Open Meetings Act in several respects: (1) that a closed session on September 25, 2007, was required by the Act to have been conducted in a public session; (2) that the Commissioners failed to properly disclose, within publicly available minutes, information about the September 25 closed session as well as for a series of closed sessions between May 24 and October 9, 2007; and (3) that the Commissioners held an unannounced closed session on or about May 23, 2007.

For the reasons explained below, we conclude as follows: (1) The September 25, 2007, session was unlawfully closed. (2) The publicly available minutes for a series of meetings are legally deficient in that they fail to disclose information required by the Act. (3) Adequate advance notice was provided for a closed meeting held on May 23, 2007.

I

Complaint and Response

A. Closed Session on September 25, 2007

On September 25, 2007, the Commissioners held three closed sessions, the second of which was documented as within the exceptions in §10-508(a)(1)(i) and (7),¹ suggesting that the session involved a personnel matter and the obtaining of advice from the Commissioners' legal counsel. According to the complaint, what

¹ All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

actually transpired during the closed session was the Commissioners' award of a contract for the removal of contaminated soil at the Matapeake Ferry Terminal on Kent Island. The complaint indicated that, in a subsequent interview, the president of the Board of County Commissioners confirmed that, during the closed session, the Commissioners approved two motions, one waiving the County's procurement policy, apparently to allow a no-bid contract, and the other addressing the scope of the clean-up effort. The complaint alleged that these actions, confirmed by other Commissioners, "had little or nothing to do with the exemptions ... cited to close the meeting."

In a timely response on behalf of the Board of County Commissioners, Leslie Stellman, Esquire, denied that the Act was violated. The response noted that the Commissioners' actions were made public that day, as reported in press accounts, and by public comments a few days later by the Board president. While the response acknowledged that the publicly available minutes of that date inadvertently failed to reflect the public statements confirming the closed session votes, the County Commissioners noted that the minutes of the October 16 meeting reflect that the County Administer reviewed the action at a meeting October 9. Because, over a two-week period, the public was made aware of the actions taken during the closed session through a variety of means, the Commissioners' position is that no violation of the Open Meetings Act occurred.

B. Information About Closed Meetings

The complaint alleged that the information publicly disclosed subsequent to the September 25 meeting failed to comply with the Act, in that it failed to reveal those in attendance and its description of the discussion topic amounted to "evasive boilerplate," merely repeating the cited statutory text. The complaint noted that the public really has no way of evaluating the propriety of the other closed sessions on that date due to the limited information disclosed after the meeting. The complaint identified the following excerpts from the minutes: Citing §10-508(a)(1)(i), along with its statutory text, and §10-503(c), the Commissioners indicated that they had "reviewed various personnel and administrative items." Citing §10-508(a)(1)(i) and (8), the Commissioners "discussed personnel and legal issues." In summary, the complaint indicated that "there is no description of items discussed, no mention of what actions (if any) were taken, and no listing of those attending." The complaint also specified a series of closed sessions between June 26 and October 9, 2007, for which similarly insufficient information was made public after the closed sessions.²

² The dates of the closed sessions were as follows: June 26, July 10 and 24, August 17 and 21, September 4, 11, and 18, and October 2 and 9, 2007. We need not repeat the details for each closed session but will refer to examples as appropriate in Part II.B below.

According to the response, in some of the sessions addressed in the complaint, the Commissioners were addressing administrative functions, “thus removing them entirely from the ambit of the [Open Meetings Act.]” Furthermore, the response indicated that the County Commissioners, in conducting such sessions, “complied with the requirements of Section 10-503(c), by identifying the subject matter discussed at the administrative function meeting[s].” According to the response, other closed sessions addressed in the complaint were “properly and lawfully closed pursuant to Section 10-508 for legitimate purposes proscribed by that statute ...” The Commissioners’ response included copies of the forms completed at the time the majority of sessions addressed in the complaint were closed as well as the minutes of the closed sessions and the publicly available minutes memorializing the closed sessions.³

The response acknowledged that the detail disclosed following closed meetings was not conveyed “as effectively as the [c]omplainant would like.” However, the lack of detail may be attributed, in part, to the Commissioners’ “good faith effort to swiftly issue public minutes.” Furthermore, the response noted that in a small county such as Queen Anne’s, “the identification of anything more than ‘personnel items’ ... may well risk harm to individuals about whom the public is likely to be aware are up for discussion. It would exalt form over substance for the Compliance Board to require specific words to provide greater detail regarding the nature of a specific contemplated personnel action ..., particularly where the personnel action may be one which, if known to the public, would tend to expose the object of that intended action to public ridicule and embarrassing publicity. Similarly, [disclosures] about the purchase of land, without more specificity, is the only way to insure [*sic*] that the information will not be guessed at, allowing the public to learn of sensitive real estate information at a time when such knowledge, if widely known, could harm the County’s interests.”⁴ The response specifically addressed the lack of detail in connection with the closed session held October 2. The publicly available minutes reflected that “several personnel items” were discussed in closed session. According to the response, “[t]he highly sensitive nature of these discussions required no more than the information contained in both the open and closed meeting minutes in order to comply with the [Open Meetings Act].”

³ The response failed to address two meetings identified in the complaint, July 24 and August 7, 2007.

⁴ While the Commissioners’ response focused on the public disclosure at the time the meetings were closed rather than post-session disclosures, the actual subject of the complaint, the policy arguments set forth in the response concerning the level of detail would appear analogous.

The response acknowledged that the Commissioners have failed to consistently identify those in attendance at its closed meetings as required under §10-509(c)(2)(iv). The response described the omission as “at best a technical violation of the [Act]” and indicated that it is a problem the Commissioners intend to cure “by insuring [*sic*] that, at all future closed meetings, minutes [will be] taken by the Commissioners’ executive assistant trained in [Open Meetings Act] compliance requirements.”

C. *Notice of May 23, 2007, Closed Session*

Finally, the complaint alleged an unannounced closed meeting that the Commissioners reportedly held on May 24. However, the complaint suggested that the meeting may have actually occurred on May 23, because it occurred at Sudlersville Middle School, where a budget hearing was scheduled that day at 7:00 p.m. The complaint noted that the closed session was reported in the minutes of a meeting held May 22, in advance of the closed session. And, as was alleged about the other closed meetings, the post-session disclosure failed to provide any meaningful topic description, a list of those in attendance, and an indication of actions taken.

The response included a copy of the notice posted at the Liberty Building in Centreville and indicated that the notice was also posted on the County’s web site. Acknowledging that the session was scheduled on relatively short notice, the timing was “due to 11th hour concerns with respect to water service into Sudlersville.”

II

Analysis

A. *Closed Session on September 25*

When a public body closes a meeting subject to the Open Meetings Act, discussions must be limited to matters permissible under the Act and properly identified in advance of the session. §10-508(b) and (d); *see also* 4 *OMCB Opinions* 12, 19 (2004) (public body may not close session for one purpose and then, while in closed session, take up different, unrelated matter, even if second topic could permissibly be addressed in closed session). Any exception under the Act authorizing closure must be construed strictly in favor of open meetings. §10-508(c). After all, it is the policy of the Open Meetings Act that public business be performed in an open and public manner in order that the public has the opportunity to observe the deliberative and decision-making process. §10-501(a); *see also City of New Carrollton v. Rogers*, 287 Md. 56, 72 (1980) (“It is ... the deliberative and decision-making process in its entirety which must be conducted in meetings open to the

public since every step of the process ... constitutes the consideration or transaction of public business.”)

The Commissioners’ discussions during the second closed session on September 25 were not limited to personnel matters and obtaining legal advice, the cited grounds for closure.⁵ The Commissioners nonetheless argue that no violation occurred in light of subsequent formal and informal disclosures as well as public news coverage concerning their actions.

This argument is untenable. In our view, subsequent disclosure does not cure the wrongful denial of the public’s right to witness the deliberative process of a public body *at the time it occurs*. We find that because the discussion exceeded the limited scope of the exceptions in §10-508(a)(1) and (7), the Commissioners violated the Act’s requirement that they meet in open session, §10-505, and denied the public the right under §10-507(a) to observe their deliberations.⁶

B. Information About Closed Sessions

When a public body closes a meeting under the Act, certain disclosure requirements must be followed. Before the closed session, the presiding officer is required to complete a written statement disclosing the reason for closure, including the applicable authority under §10-508(a), and listing the topics to be discussed. §10-508(d)(2)(ii). After the closed session, the minutes for the next public meeting must include a statement of the time, place, and purpose of the closed session; a record of the vote under §10-508(d)(1) supporting closure; the statutory authority under which the session was closed; and a listing of the topics of discussion, persons present, and each action taken during the closed session. §10-509(c)(2). While there is some overlap in the required disclosures, the requirements are distinct, and both must be followed. *See, e.g., 1 OMCB Opinions* 63, 65-66 (1994).

The complaint focused on the Commissioners’ failure to identify in the publicly available minutes a list of those present, a deficiency that the Commissioners conceded and agreed to avoid in the future. The complaint further focused on the failure to provide any meaningful description of the topics discussed,

⁵ Nor is it clear from the record whether legal counsel was even present during the session. The exception in §10-508(a)(7) may only be invoked when legal counsel is a genuine participant in a discussion about an issue on which the counsel’s advice is sought and given. *1 OMCB Opinions* 35, 37 (1993)

⁶ The Commissioners did not claim, nor could have they claimed, that the session involved an administrative function excluded from the Act. The discussion involving approval of a contract was a quasi-legislative function subject to the Act. *See* §10-502(b)(2)(v) and (j).

a matter that the Commissioners dispute. The Commissioners rely, in part, on information in the minutes of their closed sessions to refute the allegations about the basis for the closed sessions. However, minutes of closed session are not normally available to the public.⁷ The response did not suggest that these minutes were made public by the Commissioners. Therefore, the content of these minutes is beside the point. The purpose of the required disclosure in publicly available minutes is to assist the public in holding public bodies accountable for their actions in closed sessions. 4 *OMCB Opinions* 24, 25 (2004).

We agree with the complainant that the descriptions provided subsequent to closed sessions were inadequate. We need not address every session, because the practice reflected a pattern of consistently vague and uninformative reporting; thus, a few examples will suffice. The publicly available minutes reflecting the first closed session conducted on October 9 cite the applicable statutory authority, then note that “[t]he Board discussed the purchase of property, several personnel and legal items.” Similarly, the publicly available minutes reflecting a closed session held on August 21 cite the applicable statutory authority, then note that “[t]he Board discussed several personnel and land issues.” Other publicly available minutes are even less descriptive.

We have long held that a summary of a closed meeting must go beyond mere parroting of the statutory exception. *See, e.g., 3 OMCB Opinions* 171, 178-80 (2002); 4 *OMCB Opinions* 114, 118 (2005). To be sure, a public body is not required to divulge in publicly available minutes sensitive information that warranted the invocation of the exception in the first place. 1 *OMCB Opinions* 69, 74 (1994). But a public body must always give a description that allows the public to understand at least something of the context for the cited exception. Thus, we disagree with the Commissioners’ position that a description beyond the statutory text is unnecessary. The completely uninformative description of discussion topics violated the Act.⁸

⁷ Copies of minutes of meetings closed under the Act generally remained sealed. *See* §10-509(c)(3)(iii) and (4). Although copies were included as part of the response, we are required to maintain the confidentiality of the closed session minutes. §10-502.5(c)(2)(iii).

⁸ The response included for most of the meetings the form prepared at the time of closing each session, reflecting, among other information, the motion and vote to close the meeting. Although the complaint did not raise this issue, we would be remiss if we failed to point out that the presiding officer consistently failed to actually identify the specific statutory authority justifying the closure and failed to provide any meaningful explanation of the topics to be discussed. *See* §10-508(d)(2)(ii). Paralleling our decisions on post-session minutes, we have consistently held that an explanation on a form used in closing a meeting that provides no information beyond parroting the applicable statutory text is inadequate. *See, e.g., 4 OMCB Opinions* 38, 41-42 (2004). The response cited the form

The response also noted that some of the sessions involved an administrative function, and the Commissioners complied with the Act “by identifying the subject matter discussed at the administrative function meeting.” We disagree. The extent of disclosure routinely provided is illustrated by the first closed session conducted on September 25: “The Board reviewed various personnel and administrative items.” Subject to limited exceptions, a session involving an administrative function generally is not governed by the Act. *See* §10-503(a)(1) and (b). However, under an amendment to the Act effective October 1, 2006,⁹ when a public body recesses an open session to carry out an administrative function outside the public’s view, the publicly available minutes must reflect the date, time, place, and persons present and “a phrase or sentence identifying the subject matter discussed at the administrative function meeting.” §10-503(c). For the reasons stated above, the mere parroting of the statutory term, *i.e.*, “review of an administrative item,” is not legally sufficient.¹⁰

C. Notice of May 23 Session

According to the Commissioners’ response, notice of a 6:00 p.m. closed session on May 23 was posted at the County office building. The Commissioners did not state exactly when this notice was posted, but apparently it was not long before the meeting. This timing was necessitated by the unanticipated need to discuss certain concerns with respect to water service into Sudersville. Based on the Commissioners’ response, we found no violation. *See 4 OMCB Opinions* 99, 101 (2004) (Compliance Board will not second-guess a public body’s decision to meet on short notice absent evidence suggesting improper motive).

The public available minutes submitted with the response reflected sessions held on May 22 and 24. However, the latter reference appears to have been a

used in connection with a closed session held May 22 as an example of what the Commissioners viewed as compliance with the Act; this submission is inapposite because the session was not even the subject of the complaint nor was the explanation typical of that found in the numerous other examples. More typical are explanations such as “personnel,” “land acquisition,” and “legal,” providing the public with no information at the time of closure to evaluate the legal justification of the statutory authority relied on. This practice violates the Act. *Id.*

⁹ *See* Chapter 584, Laws of Maryland 2006.

¹⁰ While the minutes indicated that the closed session was “adjourned,” possibly suggesting a separate meeting, the minutes as a whole make clear that the closed session was conducted as part of single lengthy meeting. Furthermore, the closed session involved matters apparently deemed subject to the Act. As to these the publicly available minutes memorializing the session failed to disclose the action taken during the course of the session as required by the Act. §10-509(c)(2)(iv).

typographical error. It is clear that the session occurred before the budget hearing on May 23. While the better practice may have been to issue the minutes for the two dates as separate documents, the single combined document did not violate the Act. However, the limited information disclosed in the document resulted in the same deficiencies addressed in Part II.B above.

III

Conclusion

We hold as follows:

- The County Commissioners violated the Open Meetings Act on September 25 by considering matters in a closed meeting that should have been to public observations;
- Publicly available minutes memorializing a number of closed sessions were legally deficient in that they failed to provide any meaningful description of the topics discussed, to disclose those present, and to reveal any actions taken.
- The Commissioners gave adequate advance notice of a closed session on May 23.

OPEN MEETINGS COMPLIANCE BOARD

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